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No. 187

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

vs.

FEDERAL POWER COMMISSION,
EL PASO NATURAL GAS COMPANY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF RESPONDENT EL PASO NATURAL GAS COMPANY IN OPPOSITION

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IN THE

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OCTOBER TERM, 1961

PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

vs.

FEDERAL POWER COMMISSION,
EL PASO NATURAL GAS COMPANY,
Respondents.

No. 187

BRIEF OF RESPONDENT EL PASO NATURAL GAS COMPANY IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Petitioner seeks review of a judgment of the United States Court of Appeals for the District of Columbia Circuit[1] affirming an order of the Federal Power Commission which issued to El Paso Natural Gas Company a certificate of public convenience and necessity to acquire by merger and, thereafter, to operate the facilities of the Pacific Northwest Pipeline Corporation pursuant to Section 7(c) of the Natural Gas Act.

In compliance with the Commission's order and certificate, the merger was consummated on December 31, 1959; and since that time the merged company has been operated as a single integrated pipeline system.[2]

Petitioner contends that there were substantial irregularities in the conduct of the proceedings which raise important questions of administrative law or procedure. However, the alleged irregularities simply did not occur. Hence, no questions of administrative law, important or otherwise, arise in this regard.

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[1] The opinion of the Court by PRETTYMAN, C. J., concurred in by BURTON, J., sitting by designation, and the dissenting opinion of FAHY, C. J., are printed in Petitioner's Appendix A ("Pet. App. A, 1-15").

[2] All references in this brief to El Paso and Pacific are to the period prior to their unification.

Petitioner further erroneously contends that this case provides an opportunity to settle the law with respect to the relationship of the Natural Gas Act and the antitrust laws, which the Commission and the Court of Appeals allegedly misunderstood. In accordance with the decisions of this Court, the Commission proceeded to hear and determine this case pursuant to the Natural Gas Act, the primary frame of reference provided by Congress to the Commission for natural gas regulation; and the Commission fully considered and properly weighed the impact of the merger upon competition together with all other factors bearing on the public interest. Accordingly, this case does not pose any unsettled questions.

There is no occasion for further review:[1] The Court of Appeals has reviewed and rejected all the objections here advanced in affirming the decision of the Commission, which reviewed and adopted the decision of the Presiding Examiner.

Moreover, Section 19(b) of the Natural Gas Act precludes judicial review of petitioner's objections that the Commission foreclosed cross-examination and that the Commission should have deferred hearing and deciding the case until the resolution of the antitrust case (see pp. 21-25, infra), since petitioner failed to urge such objections in its application for rehearing of the Commission's order.[2]

Statutes and Regulations Involved

Set forth in the appendix to this brief are the pertinent provisions of the Natural Gas Act, the Commission's

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[1] See *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490-91, 493-94; *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275.

[2] Section 19(b) of the Natural Gas Act (15 U.S.C. § 717r(b)) provides, in part: "No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do." See *Federal Power Commission* v. *Colorado Interstate Gas Company*, 348 U.S. 492.

Rules of Practice and Procedure and Section 7 of the Clayton Act.

Statement

The Commission found that the unification of El Paso and Pacific and their operation thereafter as an integrated pipeline system would result in important benefits to the consuming public and are required by the public convenience and necessity.

The decision of the Presiding Examiner (JA 1149-1240[1]) and the order of the Commission (JA 1290-1310, 1353-58), which adopted that decision and prescribed additional conditions, contain comprehensive and detailed findings based on the evidence, and reflect consideration of all relevant factors bearing on the public interest, particularly the needs of consumers in the ten states of the West served by El Paso and Pacific.

The El Paso and Pacific Pipeline Systems

The El Paso system, including some 6,700 miles of main transmission lines, extends westward from the Permian Basin of West Texas across New Mexico, connects to the San Juan Basin of northwestern New Mexico and southwestern Colorado, and crosses Arizona to the California boundary. The Pacific system, including some 2,125 miles of main transmission lines, extends in a northwesterly direction from the San Juan Basin across the Rocky Mountains through Colorado, Utah, Wyoming, Idaho, Oregon and Washington to the Canadian boundary. (JA 1161, 1163-66, 1291-92; see map, Ex. 1, JA 564.)

El Paso, which had been serving markets in West Texas, New Mexico and Arizona for many years, was authorized by the Commission in 1946 to build its initial pipeline to California. Since the end of World War II, these market areas have experienced an ever-increasing demand for

[1] All references to the record filed in this Court with the petition, which was the Joint Appendix filed as the record in the Court of Appeals, are "JA ".

natural gas, which is expected to continue for many years. In authorizing the expansion of El Paso's pipeline facilities, the Commission had repeatedly recognized in several decisions[1] that El Paso's urgent need was to find sufficient new and large quantities of gas reserves to keep pace with this increased demand and to insure continuous and dependable service to meet the tremendous present and future requirements of these markets. (JA 1160-62, 1173, 1189-90, 1196-99, 1215-18, 1297-98, 1301.)

Conversely, Pacific, whose system was authorized by the Commission in 1954 to provide natural gas service for the first time to the Pacific Northwest, had access to the large existing and potential gas reserves in the newly explored and developing regions of Canada and the Rocky Mountains, but its markets were undeveloped. Pacific, because of several factors including financial difficulties, was unable "to conduct a vigorous plan or program to bring about truly effective natural gas service" (JA 1210) to these markets. (JA 1165, 1167, 1204-05, 1209-14, 1296, 1298-1300.)

In 1958, El Paso utilized its full capacity and sold approximately 600,000 mcf per day to customers, principally distribution companies, in West Texas, New Mexico and Arizona; and 2,055,000 mcf per day to the three principal California gas distribution utilities. In 1958, Pacific sold a total of approximately 500,000 mcf per day to gas distribution utilities and industrial users principally in Oregon and Washington, and to three other pipelines, one of which was El Paso, whereas it had a capacity of 646,000 mcf per day. Moreover, there was substantial idle capacity in important segments of the Pacific line in the Rocky Mountain area following Pacific's importation of Canadian gas. (JA 1162, 1166, 1190, 1209, 1210, 1219-20.)

Pacific's financial difficulties were the result of a number of factors. The market forecasts submitted to the Com-

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[1] *San Juan Pipe Line Co.*, 8 F.P.C. 991, 994 (1949); *Matters of El Paso Natural Gas Co.*, 16 F.P.C. 1354, 1357 (1956); 19 F.P.C. 393, 394-95 (1958); 22 F.P.C. 900, 903 (1959).

mission in support of Pacific's initial application for a certificate fell far short of fruition. The estimated profits from natural gas by-products operations, which were a significant factor in the Commission's evaluation of the economic feasibility of the proposed Pacific system, failed to eventuate. Pacific's sales and revenues "were well below the [initial] estimates of them and were indeed insufficient for the operation of the company business of rendering a public service" (JA 1211). (JA 1209-12, 1219, 1296, 1299-1300.)

As a result of these and other problems, Pacific was forced to take stringent measures such as "minimal expenditures for operation and maintenance" (JA 1210); insufficient personnel; sale of its stock in its Canadian pipeline supplier to avoid default on preferred stock dividend requirements; and curtailment of expenditures for development of natural gas acreage. (JA 1209-12, 1213-14.)

Pacific could not make "capital expenditures . . . for the expansion of [its] markets, and segments of the public [were] thus deprived of natural gas service" (JA 1211-12). In sum, Pacific "did not have the financial capacity to render the type of service to its markets that should be expected of an interstate pipeline company" (JA 1212); yet it had access to the recently developed and potentially abundant "dry gas" reserves (produced from a gas stratum and not in conjunction with oil) in the Canadian and Rocky Mountain areas (JA 1207, 1298).

El Paso's gas supply was provided principally from the Permian Basin of West Texas and southeastern New Mexico and the San Juan Basin of northwestern New Mexico. Most of the gas produced and supplied to El Paso in the Permian Basin (which has been producing oil and gas for more than thirty years), is known as residue gas, because it is produced in conjunction with the production of oil. The rate and volume of oil production are controlled by "allowables" fixed by state conservation agencies. (JA 1163, 1198, 1205-08, 1298.)

The time and volume of deliveries to El Paso of residue gas are dependent upon the production of oil. In order to meet the fluctuations and deficiencies in residue gas deliveries resulting from the variations in oil production, El Paso must have available for delivery at all times large quantities of "dry gas" in order to provide and assure adequate and continuing service to its customers, whose demands, both as to time and volume, are unrelated to the economics of oil production and the oil industry.[1] The San Juan Basin, whose exploration and development were stimulated by El Paso starting in 1948, was El Paso's principal source of dry gas (JA 1205-08, 1298).

In sum, El Paso, serving the California and Southwest markets, was a pipeline with an urgent and continuing problem of acquiring substantial gas reserves to assure continuous and dependable service to meet both present and future requirements. Pacific, attempting to service the Pacific Northwest market, was a new pipeline encountering serious financial difficulties, with an over-abundance of potential supply, and direct connection to the large new dry gas reserves of Canada and of the Rocky Mountain regions, which it then could not use.

The Findings of Public Interest

In finding that the creation and operation of a unified El Paso-Pacific pipeline system were required by the present and future public convenience and necessity under the Natural Gas Act, the Presiding Examiner and the Commission made detailed and affirmative findings with respect to the significant benefits to the consuming public which would result.

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[1] See *San Juan Pipe Line Co.*, 9 F.P.C. 170, 180-81 (1950); *Matters of El Paso Natural Gas Co.*, 5 F.P.C. 115, 121, 125-26 (1946); 8 F.P.C. 726, 728 (1949); 16 F.P.C. 1354, 1355 (1956), with respect to the use of residue gas by El Paso; the relationship to and need for dry gas reserves; and the fact that as more dry gas becomes available, more residue gas can be utilized, rather than flared and wasted.

Improved gas supply and utilization of gas reserves (JA 1196-1209, 1297-99). The integration of the two pipelines creates "a pipeline system extending from West Texas to Canada, fully unified and having many sources of supply available to serve the combined system markets, and to benefit all consumers" (JA 1298).

There will be increased stimulation of exploration for and development of natural gas resources, particularly in the newly explored regions of Canada and the Rocky Mountains to which Pacific has access. The more balanced integration of residue gas and dry gas supplies "will aid conservation, [and] lengthen life of reserves. . . ." (JA 1299).

A financially stronger gas supplier (JA 1209-15, 1299-1301). The unification of El Paso and Pacific will result in a financially stronger supplier, to the benefit of consumers in respect of rates and the ability to provide more effective and additional service.

Because dry gas reserves have a substantially longer life than residue gas reserves and because the maturity life of El Paso bonds largely has been based on the life of its reserves, the acquisition of substantial dry gas reserves will "assist El Paso in marketing bonds having a longer maturity life" (JA 1299) and consequently on more favorable terms. "Cost of money" is one of the cost ingredients of rates.

The merger will provide the opportunity to attract new debt and equity capital for investment in facilities in those areas served by Pacific, which, the Commission found, would otherwise have been costly, if not impossible, for Pacific to obtain because of its financial condition.

Also, consumers will benefit as the result of the utilization by El Paso of substantial tax loss carryforwards generated by Pacific in 1955 and 1956, which in the absence of the merger, would have been lost.

Expanded and improved gas service (JA 1200-01, 1215-22, 1301-03, 1354). Consumers in all the markets served by

El Paso and Pacific will benefit from the increased availability of additional supplies of gas. The unification of El Paso and Pacific will make better use of Pacific's pipeline capacity and provide and increase flexibility of operation.

The interest of consumers requires the use of installed facilities during their maximum useful physical life and this is dependent upon continuing sources of gas. And, as the Commission said (JA 1303):

> "[W]e cannot appraise the proposed merger from a narrow viewpoint but must look to the future when gas supplies north of El Paso's present system become more important as Permian and San Juan reserves decrease and when additional facilities are built to provide free movement of gas north and south."

Lower rates than would otherwise occur (JA 1222-25, 1303-05, 1354). With respect to costs which go into the making of rates in addition to those already discussed, the Commission found that unified operation and administration of the merged system "will result in savings that will tend to lower rates or prevent them rising more than they would otherwise" (JA 1303). Savings will be effected by the elimination of duplication of functions.

Pacific's financial condition would have required substantially higher rate increases than have or will occur. No rate changes as a result of the merger were sought by El Paso or Pacific; and El Paso agreed that for at least one year after the merger no rate increases would be sought on the Pacific portion of the merged system.

Impact on competition and the absence of public benefit from any competition Pacific might produce (JA 1185-96, 1217, 1295-97, 1356-57). The Commission found that in view of Pacific's financial difficulties and its then inability to develop sufficiently the markets to which it was already connected, Pacific was not a potentially strong com-

petitor to serve California.[1] Hence, no detriment to the public interest would result from the elimination of Pacific as a potential competitor.

Substantial competition to serve the natural gas needs of California would be provided by the two new pipeline companies, Transwestern Pipeline Company and Pacific Gas Transmission Company.[2]

The Commission found that the merger would not result in any substantial lessening of competition; and, that in any event, the benefits to the consuming public from the integration of El Paso and Pacific far outweigh any possible detriment by reason of the elimination of Pacific as a potential competitor.

The Commission Proceedings

Twenty-three days of hearings were conducted before the Presiding Examiner, which were concluded on January

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[1] The Presiding Examiner found that "the financial difficulties encountered by Pacific in the construction and commencement of operation of its pipeline" were such that "it may be found definitely that Pacific, standing alone as a separate corporation, did not have the financial capacity to compete seriously for any share in the California market" during the Fall of 1956 or for several years (JA 1186-87, 1192, 1217, 1296).

The purported series of events set forth in petitioner's Statement of the Case relating to Pacific's efforts to sell gas to California (Pet. 6-7) and petitioner's assertion (Pet. 19) that Pacific would have been a strong competitor but for alleged efforts by El Paso "to wean away from [Pacific] . . . the customers it was wooing", ignore the evidence and the findings (JA 1186-87). Moreover, petitioner made no objection to these findings in its Exceptions to the decision of the Presiding Examiner (JA 1277-89), or thereafter in its application for rehearing (JA 1340-51).

Petitioner describes the Southern California Edison Company ("Edison") as a "gas distributing utility" in conjunction with its allegation that the President of El Paso told Edison that dealings by it with Pacific would not be in the public interest (Pet. 6).

Edison is an electric utility and it uses natural gas solely for purposes of producing electricity. The evidence shows that El Paso's President's remarks were made to Edison concerning public interest questions arising from firm sales to Edison and a consequent loss of interruptible sales and income to El Paso's customer, the Southern California Gas Company, one of the gas distribution utilities serving domestic consumers in the Southern California area and also serving Edison (JA 309, 401-403). This Court is familiar with the public interest questions involved and it is precisely to those questions that El Paso's President expressed his view. See *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, and see fn. 23, page 29 therein.

Petitioner also alleges (Pet. 20) that the Commission ignored the alleged "prospect of continued and increased competition" between El Paso and Pacific "but for the intervention of El Paso". The findings of the Presiding Examiner (JA 1168-71, 1186-87) show consideration of precisely the opposite prospect.

[2] Pacific Gas Transmission Company's principal stockholder is Pacific Gas & Electric Company, which is El Paso's largest single customer. See JA 132, 1188.

6, 1959 (JA 1156, 1295, 1357). After El Paso and Pacific had introduced their evidence in support of the applications, all parties were afforded a full opportunity to cross-examine and *no line of inquiry pursued by any of the parties was foreclosed.*[1]

The States of Arizona, Idaho, Nevada, New Mexico, Oregon, Texas, Washington and Wyoming actively and affirmatively urged approval of the unification of El Paso and Pacific (JA 1155-56 and fn. 1 at p. 1156).

Petitioner opposed the merger; it did not offer any witnesses and did not introduce any exhibits.

On November 20, 1959, which was some six months after the last brief was filed[2], the Presiding Examiner issued his comprehensive sixty-two page decision (JA 1149-1240, 1295, 1357).

El Paso then served and filed a motion urging the Commission to consider the matter promptly, pointing out that if the Commission were to authorize the merger, the merger should be consummated on December 31, 1959 to avoid the loss of a substantial portion of Pacific's tax loss carryforward (JA 1241-44, 1300, 1358). Following the filing of Exceptions to the Presiding Examiner's decision, the Commission heard a full day of oral argument on December 10, 1959 (JA 1244, 1295, 1357).

On December 23, 1959, the Commission issued its decision and order (JA 1290-1310, 1357). In compliance therewith, the merger was consummated on December 31, 1959. And on February 17, 1960, the Commission denied petitioner's application for rehearing which had been filed on January 20, 1960 (JA 1353-58).

Petitioner's Position Below

At the outset of the hearings petitioner stated its opposition to the merger on the ground that California should not

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[1] See p. 17, infra.

[2] After the hearings were concluded, and in pursuance of a schedule agreed upon by all of the parties including petitioner, some five months followed during which the parties filed their briefs and each party had an opportunity to reply to the contentions of the other parties (JA 1153-56, 1357).

be dependent upon a single out-of-state supplier of natural gas; and that therefore Pacific should not be eliminated as a potential competitor to serve California (JA 5-7).

Moreover, as petitioner's counsel then stated (JA 7):

> "... [L]et me say without qualification that I am certain that no matter what is developed here by the corporate applicants, our position will not be changed in the leastwise. We have definite notions about this merger."

After the close of the hearings, petitioner substantially expanded the grounds of its objections to the unification of El Paso and Pacific (e.g. JA 1277-89, 1340-51). In its application for rehearing filed with the Commission, petitioner for the first time claimed the improper taking of official notice and that the Commission had decided the case too promptly (JA 1343-45, 1348-49).

In its briefs in the Court of Appeals, petitioner added three new arguments relating to (1) alleged preclusion and denial of cross-examination; (2) alleged failure of the Presiding Examiner to give the documentary evidence adequate consideration; and (3) alleged *ex parte* contacts between representatives of El Paso and Pacific and members of the Commission.

The Department of Justice, as *Amicus Curiae*, in the Court of Appeals; and the Events in the Antitrust Suit

In the Court of Appeals after the briefs of all of the parties had been filed, the Department of Justice, as *amicus curiae*, filed a brief (and participated in the oral argument) in opposition to the Commission's decision.

The Department's principal contention in the Court of Appeals was that the Commission should have stayed its determination under Section 7 of the Natural Gas Act pending disposition of the complaint of the Department's Antitrust Division in the District Court for the District of Utah challenging the validity of El Paso's acquisition of Pacific's

stock under Section 7 of the Clayton Act[1], the trial of which, however, had been continued by the District Court on October 13, 1958 until final determination of the Commission proceedings.[2]

Since the Department's contention injected this new objection in the appellate review of the Commision's order, a brief resume of the antitrust suit and the events preceding it is appropriate at this point.

El Paso's interest in acquiring Pacific and its insistence that the proposed transaction be submitted for approval to the Commission (JA 1171-73, 1182, 1293). In December of 1954, El Paso first became interested in acquiring Pacific, to provide a connection between the markets served by El Paso and the potential supply of gas primarily in Canada, and also in the Rocky Mountains, to which Pacific had immediate access, in order to meet the continuing and urgent need for additional gas supply.

Negotiations between El Paso and Pacific from January to March of 1955, and from December 1955 to February 1956, each broke down because of El Paso's insistence that the proposed transaction be such that would require prior approval and certification by the Commission pursuant to Section 7(c) of the Natural Gas Act. Pacific would not agree to this condition because it did not desire to become involved in a protracted Commission proceeding at these very critical early periods of its existence when it was engaged in the construction of its pipeline, recruiting its operating personnel and seeking additional financing.

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[1] This objection, now adopted by petitioner for the first time, is not reviewable pursuant to Section 19(b) of the Natural Gas Act, because not urged in petitioner's application for rehearing of the Commission's order.

Also, petitioner did not object in its Exceptions to the Presiding Examiner's holding that despite the pendency of the antitrust case, El Paso had "the right, as a regulated natural gas company, to come before this Commission and request a determination of the issue of whether, under all facts and circumstances, its acquisition of the facilities of Pacific is in the public interest" (JA 1183). See Rule 1.31(c) of the Commission's Rules of Practice and Procedure (p. A-5, infra), and *State of Wisconsin* v. *Federal Power Commission*, 201 F. 2d 183, 186-87 (D. C. Cir. 1952), cert. denied, 345 U.S. 934.

[2] Alternatively, the Department supported petitioner's contention that the applications should have been denied because of antitrust considerations.

El Paso's acquisition of Pacific's stock (JA 1172, 1182, 1293). In the light of the serious problem of its gas supply,[1] finally, in November of 1956, El Paso met Pacific's conditions and agreed to offer an exchange of El Paso stock for Pacific stock.

By the end of January of 1957, El Paso had acquired more than 80% of the stock of Pacific; and by May of 1957 it had acquired approximately 99.8% of the stock of Pacific.

The commencement of the antitrust suit by the Department (JA 1175-76, 1183, 1293-94). On July 22, 1957, the Department of Justice filed a complaint in the United States District Court for the District of Utah in which it was alleged that El Paso's acquisition of Pacific's stock violated Section 7 of the Clayton Act.

El Paso's and Pacific's filings of applications with the Commission (JA 1182-83, 1293-94). On August 7, 1957, El Paso and Pacific filed with the Commission their applications pursuant to Sections 7(c) and 7(b), respectively, of the Natural Gas Act. On July 16, 1957, the boards of directors of El Paso and Pacific had authorized the filing of these applications after it had become apparent that the operations of the two systems could be more effectively accomplished by their integration, and subsequent to the receipt of information that the Department intended to file the antitrust action. The President of El Paso testified in the Commission hearings (JA 142-43) that this information "considerably stimulated" the filing of El Paso's and Pacific's applications and that the filing of the applications would thus enable the Commission to evaluate the merits of the unification and El Paso's control of Pacific from the point of view of the entire public interest pursuant to and in the light of the policies of the Natural Gas Act.

The District Court's denial in October 1957 of El Paso's and Pacific's motion to dismiss or to stay the antitrust

[1] See *El Paso Natural Gas Company*, 16 F.P.C. 1354, 1356-57 (1956).

case. In October 1957, the District Court denied El Paso's and Pacific's motion to dismiss or to stay the antitrust action. In March of 1958, this Court denied El Paso's and Pacific's application for an extraordinary writ of certiorari.[1]

The commencement of hearings in the Commission proceedings (JA 1133-34, 1153, 1177, 1295). In July of 1958, the Commission set down the applications of El Paso and Pacific for hearing to commence on September 17, 1958.[2]

Hearings were held before the Presiding Examiner between September 17 and September 27, 1958, at which time a six weeks recess was taken for the preparation of cross-examination.

The continuance by the District Court of the antitrust case until final determination of Commission proceedings (JA 1177-78, 1184-85, 1294-95). On October 2, 1958, El Paso and Pacific filed a motion in the District Court to continue the antitrust suit until after final determination in respect of their applications to the Commission. On October 6th, the Antitrust Division wrote to the Commission stating that argument of El Paso's and Pacific's motion in the District Court "might well be unnecessary" if the Commission would postpone resumption of its hearings until after the antitrust case was decided.[3]

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[1] *El Paso Natural Gas Company* v. *United States*, 355 U.S. 950.

[2] Prior thereto, the Antitrust Division had written to the Commission requesting that the Commission postpone its hearings pending trial of the antitrust case.

On September 6, 1958, in the District Court, the Antitrust Division withdrew a motion it had made to restrain El Paso and Pacific from participating in the then forthcoming Commission hearings. The Court then denied the Antitrust Division's alternative motion to enjoin any merger in pursuance of an appropriate Commission order, should it issue.

Two days later, on September 8, 1958, petitioner filed a motion with the Commission to stay the Commission proceedings pending the outcome of the antitrust litigation (JA 1135-47, 1176). On September 15, 1958, the Commission entered an order which denied this motion (JA 1147-48, 1176-77, 1294). Petitioner sought no rehearing or appellate review of this order. Nor did petitioner raise the matter again before the Commission or in its application for rehearing. See Section 10(c) of the Administrative Procedure Act, 5 U.S.C. § 1009(c).

[3] The Antitrust Division had declined to participate in the Commission proceedings, though on several occasions invited to do so by the Commission and by counsel for El Paso and Pacific.

Following receipt of the letter from the Antitrust Division, the Commission on October 7th wrote to the District Court and stated that it would defer to the judgment of that Court and stay its hearings if the Court decided to go forward with the trial of the antitrust case; or the Commission would proceed with its hearings if the Court postponed the antitrust proceedings.

Following hearing held on October 10, 1958, the District Court ordered that the antitrust proceedings be continued until final determination in respect of El Paso's and Pacific's applications filed with the Commission.[1]

The Decision of the Court of Appeals

The majority of the Court of Appeals held that the Natural Gas Act and the antitrust laws are complementary or supplementary and operate in their own spheres of action; that El Paso's acquisition of Pacific's stock and the proposal to merge the assets, when viewed realistically, were two steps in a single transaction to complete unification and integration of El Paso and Pacific; that the determination of whether such a unification was in the public interest was a matter within the jurisdiction of the Commission as prescribed by Congress in the Natural Gas Act; that Congress

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[1] Upon conclusion of the oral argument held on October 10th, the Court said that it wanted to know what the Commission would find on the question of whether the unification of El Paso and Pacific would be in the public interest under the Natural Gas Act. The Court said that if the Commission's findings were adverse to El Paso and Pacific, the antitrust case would be tried; and that if the Commission approved the merger pursuant to the Natural Gas Act, and particularly in view of the last paragraph of Section 7 of the Clayton Act (see pp. 23-24, infra), the Court would then want to hear argument on the legal question of the effect of the Commission's decision upon the antitrust suit.

At this hearing, the Court pointed out that it had denied the prior motion for stay which El Paso and Pacific made in October 1957 largely because it then appeared that the Commission hearings would not be immediately forthcoming, and the Antitrust Division had assured the Court that it would be prepared to go to trial in three months; whereas at this time in October 1958, the facts, as the Court stated, were that the Division had delayed inordinately and was not yet prepared to try the case and the Commission already had conducted several days of hearings.

Further proceedings in the District Court have been deferred in pursuance of the Court's order entered on October 13, 1958.

intended under Section 7 of the Natural Gas Act to confer effective jurisdiction and power to the Commission respecting acquisitions and not simply power to approve or disapprove an intra-company bookkeeping transaction (which otherwise would be the result); that the Commission's duty was to inquire and consider all factors bearing on public interest, including the impact on competition; and that the Commission had effectively understood and carried out that duty (Pet. App. A, 10-14). Circuit Judge FAHY dissented to the decision of the Court on the grounds and conclusions advanced by the Department of Justice, as *amicus curiae*, that the Commission should have either denied the application or stayed its proceedings pending the outcome of the antitrust litigation (Pet. App. A, 14-15).

The Court unanimously held that the Commission properly inquired into and considered the impact of the merger on costs, which are an essential element in the determination of rates; that the Commission properly found the merger would result in a lower average unit transportation cost of gas to all consumers of the merged system as a result of the several factors set forth in the findings and the evidence; that the question of allocation of costs among customers could only properly be decided in an appropriate rate case and that the conditions of the Commission's order made proper and adequate provision with respect to this matter; that the merger itself, pursuant to the order of the Commission, would not result in a change of rates and, in fact, would result in a deferral of rate increases (Pet. App. A, 6-9). The Court also held that the Presiding Examiner's remarks relating to the number of documents in evidence which he had to consider carefully were apt and appropriate (Pet. App. A, 14).

The Court of Appeals explicitly but briefly rejected petitioner's contentions relating to the Commission's findings on other matters involving its determination of public convenience and necessity (Pet. App. A, 6).

Without discussion, the Court rejected a number of contentions raised in petitioner's brief including the alleged preclusion and denial of cross-examination, the alleged improper taking of official notice, and the alleged *ex parte* contacts.

Argument

A. **Cross-examination was not foreclosed as alleged by petitioner.** Petitioner's contention (Pet. 3, 8, 21-22) has no basis in the record.[1] Petitioner cites two instances (JA 385-87, 443; see Pet. 21), as were cited by it in the Court of Appeals, which purportedly support this contention.

In the first instance, as the record shows, the Presiding Examiner made no ruling, and petitioner's counsel pursued his cross-examination until he changed to another subject of his own accord (JA 383-94).

In the second instance, counsel for the Staff (Mr. Kurtz) and the Presiding Examiner agreed, without objection from any party, that no attempt would be made to determine precisely what future rates may be, but that there should be inquiry into the "cost and the impact [of the merger] upon the consumer" (JA 440-43).

B. **The Commission properly inquired into, considered and dealt with matters relating to costs and rates.** Petitioner thrice asserts that El Paso introduced evidence relating to costs and future rates with respect to which petitioner was foreclosed from cross-examination (Pet. 8, 21, 32).

To support its unwarranted claim that the Commission did not know or consider matters relating to costs and rates, petitioner advances the contradictory allegation that applicants made no "showing as to the effect of the merger upon

[1] This contention was not urged in petitioner's application for rehearing and is therefore not subject to judicial review.

future rates" (Pet. 8).[1] The facts are that on the basis of substantial evidence the Presiding Examiner and Commission made findings, affirmed by the Court of Appeals, that the unification of El Paso and Pacific would result in lower rates than would otherwise occur if the two companies were to operate separately and that a lower unit cost of transportation to all consumers would result.[2]

C. **There is no "official notice" issue.** Petitioner alleges that the Commission took "official notice of then current applications" of two other companies to build natural gas pipelines to California; that "at the time of the decision, hearings on these applications had not been concluded"; and that petitioner had no opportunity to be heard on the effect of the existence of these pipelines upon future competition (Pet. 31-32).

The facts are that there was substantial evidence introduced in the hearings relating to competitive impact, past and future, of the Transwestern and Pacific Gas Transmission projects;[3] that this was explored upon cross-examination, by petitioner's counsel among others;[4] that the Presiding

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[1] There is no basis for the further contention (Pet. 22-23) that applicants failed to file the exhibit required by Rule 157.16 of the Commission's Regulations. See JA 1225.

[2] Petitioner's claim that the merger would "fasten eventually Pacific's poor financial situation upon California rate payers" (Pet. 21) involves questions of the future allocation of costs between various segments of the merged system, properly to be decided in the event of any proposal to change existing rates in proceedings under Section 4 or 5 of the Natural Gas Act. As the Court of Appeals held, the "Commission protected that eventuality" and "to make sure it would be able to deal with that problem should it arise, the Commission provided [in the conditions prescribed in its order] that the costs of the two merged companies should be kept separately." Further, the Court of Appeals said, allocations of some of the higher Pacific costs to California rate-payers may be justified, upon a showing of benefits to such rate-payers arising from the operation of the merged system. (Pet. App. A, 6-8).

The Court of Appeals held that the Commission properly inquired into and evaluated the effects of the merger upon future costs and that the contentions of California could not be sustained (Pet. App. A, 6-9).

[3] JA 11-12, 46, 129-34, 137-38, 139-41, 146-49, 174-81, 200-05, 270, 304-05, 308, 338-39, 341-42, 376, 405-06, 412, 415-18, 472-80, 520-31; Ex. 1, JA 564; Ex. 29, JA 700-01, 703, 707-08; Ex. 83, JA 715, 719, 721-23.

[4] JA 140-41, 146-49, 203, 304-05, 308, 338-39, 341-42, 376, 405-06, 412, 415-18, 472-80, 526-31.

Examiner made findings on the evidence;[1] that he took notice that the Transwestern project had been certificated by the Commission and the application of Pacific Gas Transmission Company had been filed and was pending;[2] and that petitioner took no exception to this aspect of the Presiding Examiner's decision.[3]

The official notice taken by the Commission fortified the findings made on the evidence. Petitioner's original and sole objection to the unification of El Paso and Pacific has been satisfied. Three interstate pipeline companies certificated by the Commission now serve California.[4] (JA 1356-57, 1187-88.)

D. **The Presiding Examiner and the Commission fully considered the evidence.** Petitioner quotes (Pet. 24) certain remarks of the Presiding Examiner with reference to administrative procedures generally, during a subsequent, totally unrelated proceeding.

In pointing out that only 15 or 25 of the exhibits had to be studied carefully in deciding the issues in the El Paso-Pacific merger case, the Examiner was illustrating his point that applicants have to submit proof in support of every conceivable aspect of their applications where other parties, including the Staff of the Commission, are not required to advance their contentions at the outset of a hearing.[5]

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[1] JA 1169, 1186-89, 1191-92, 1195, 1203, 1205, 1216, 1247-50, 1252, 1254-56, 1259-62, 1267, 1295-97, 1356.

[2] JA 1169, 1187-88, 1190-91, 1197, 1202, 1209, 1216, 1296-97.

[3] While the Commission in its order denying rehearing rejected this contention on the merits, it held that under its Rule 1.31(c), petitioner's failure to raise this as an objection to the Presiding Examiner's decision was a fatal procedural disability to review of it by the Commission on rehearing (JA 1356-57 and fn. 2 at 1356).

[4] Pacific Gas Transmission was certificated on August 5, 1960. 24 F.P.C. 134.

[5] More than 300 of the exhibits were gas purchase and sales contracts and were introduced pursuant to the Commission's Rules. Much of the other documentary evidence provided precise but uncontroversial data. There were 23 days of oral testimony before the Presiding Examiner and before rendering his decision he received detailed briefs from the parties, pointing out and abstracting the pertinent portions of the voluminous record (JA 1155-56, 1295, 1357).

El Paso's and Pacific's applications, filed more than a year before the hearings commenced, and supplemental information filed in response to requests from the Commission's staff set forth clearly the grounds and type of evidence upon which El Paso and Pacific would rely (JA 1157; see, e.g. 1071-86, 1087-1110). Petitioner, therefore, was not playing "blindman's buff", as it now contends (Pet. 27).

In these generalized remarks, the Examiner said that he had "*searched the record*"[1] for the things that were dispositive of the issue" in this proceeding, which on its face disposes of petitioner's present contention that the Examiner failed to consider all of the documentary evidence.

The Court of Appeals held that "the Examiner's remarks were both apt and appropriate. The inundation of the material with immaterial minutiae is one of the griefs which beset the administrative process. It is well to recognize it" (Pet. App. A, 14).

Petitioner also contended below and contends here that this case was decided too promptly. The Commission considered and rejected this contention in its order denying rehearing (JA 1357-58) and the Court of Appeals found it unnecessary to discuss that contention.[2]

E. Petitioner's unwarranted contentions regarding ex parte contacts did not merit discussion by the Court of Appeals. The contentions (Pet. 3, 10-11, 12, 28-31), first raised by petitioner in its reply brief in the Court of Appeals, purportedly were based on testimony before a House of Representatives' Subcommittee in May, 1960. The Subcommittee inquired into conversations, on business and social matters, which numerous representatives or employees of many companies had with members of the Commission.

At the oral argument before the Court of Appeals, petitioner's counsel vigorously argued the contentions which are

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[1] Emphasis supplied.

[2] The Presiding Examiner issued his decision eleven months after the hearing was closed and more than five months after the last reply brief was filed. The Commission decided the case more than a month after the issuance of the Presiding Examiner's decision, and thirteen days after it heard a full day of oral argument on Exceptions filed with it. This may be compared with the procedure followed in two major proceedings, in which the Commission issued certificates over opposition within a month after the close of hearings, without the benefit of an Examiner's decision. The objection that the Commission decided too quickly was rejected upon review. *Florida Economic Advisory Council* v. *Federal Power Commission*, 251 F.2d 643, 648 (D.C. Cir. 1957), *cert. denied*, 356 U.S. 959; *Panhandle Eastern Pipe Line Co.*, 6 F.P.C. 1, 7 (1947), aff'd, sub. nom. *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 169 F.2d 881, 884 (D.C. Cir. 1948), *cert. denied*, 335 U.S. 854.

renewed here.[1] The Court received from petitioner the entire printed transcript of some 700 pages of testimony before the Subcommittee and also received from El Paso a brief summary and extract of the testimony in any way related to El Paso or Pacific. The Court also requested and received from petitioner additional designations in respect of that testimony to which the petitioner wished to call the Court's attention.

With the complete record before it[2] on which petitioner based its contentions, the Court considered it appropriate to reject such contentions without dignifying them with discussion.[3]

F. There are no unsettled or substantial issues raised in this case with respect to the relationship of the antitrust laws and the Natural Gas Act. The decisions of this Court in the recent *Transco* case,[4] in the *Catco* case,[5] in the *Minneapolis Railroad* case,[6] in *McLean Trucking*,[7] in *FCC* v.

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[1] Petitioner charges, among other things, that "During the course of these proceedings various members of the Commission were under *ex parte* pressure to render this decision expeditiously" (Pet. 25) (emphasis supplied). After the Presiding Examiner issued his decision, which was more than two years after the applications were filed, El Paso and Pacific did urge the Commission to act expeditiously, *not ex parte, but by formal motion served upon all parties* (JA 1241-44).

[2] Chairman Kuykendall testified to no conversations with any El Paso or Pacific representative; Commissioner Kline testified with respect to one Pacific person that he never "discussed any phase of that [merger] case with me"; and as to one El Paso person, that he never did more than drop in "to say hello" (Subcommittee printed transcript, pp. 200, 209, see also, p. 199; Petitioner's references are to the typewritten transcript); Commissioner Connole testified that no El Paso or Pacific representative ever contacted him concerning the merger case (Subcommittee printed transcript, at p. 340). And Commissioner Stueck testified that the only El Paso or Pacific representative with whom he talked, never discussed any litigated matters with him (Subcommittee printed transcript, p 416).

[3] In cases raising any real question, the same Court of Appeals has been particularly alert to such matters and has ordered that action appropriate to the case be taken. (*WKAT, Inc.* v. *Federal Communications Commission*, —— F.2d —— (D.C. Cir., July 6, 1961) certiorari applied for on August 5, 1961; *United Air Lines* v. *Civil Aeronautics Board* (together with *Trans World Airlines* v. *Civil Aeronautics Board*), 281 F.2d 53 (D.C. Cir., 1960); *Sangamon Valley Television Corp.* v. *United States*, 269 F.2d 221 (D.C. Cir., 1959); see 358 U.S. 49. See also the recent decision, *Neirloss* v. *Bush*, —— F.2d —— (D.C. Cir., June 8, 1961).)

[4] *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, 365 U. S. 1.

[5] *Atlantic Refining Co.* v. *Public Service Commission of the State of New York*, 360 U. S. 378.

[6] *Minneapolis & St. Louis R. Co.* v. *United States*, 361 U. S. 173.

[7] *McLean Trucking Co.* v. *United States*, 321 U. S. 67.

RCA Communications,[1] in *Detroit & Cleveland Navigation*,[2] and the decisions of the Court of Appeals in the *City of Pittsburgh*[3] case and in the case for which review is here sought, stand for the fundamental principles, construing Congressional intention with respect to various regulatory statutes, including the Natural Gas Act, that Congress has committed to the particular agency the complex task of considering and resolving matters relating to the public interest; that the particular regulatory statute provides the primary frame of reference for the agency; and that the regulatory agency in certificate cases must consider and weigh all factors bearing on the public interest, including impact on competition.

As the Presiding Examiner and Commission properly held, their duty was to consider the merger's impact on competition whether or not any antitrust suit was pending (JA 1159, 1178-79, 1295-97). The pendency of the action only emphasized the need for the Commission to inquire into, consider and weigh in the balance the consequence of the elimination of Pacific as a competitor.[4]

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[1] *Federal Communications Commission* v. *RCA Communications, Inc.*, 346 U. S. 86.

[2] *United States* v. *Detroit & Cleveland Navigation Co.*, 326 U. S. 236.

[3] *City of Pittsburgh* v. *Federal Power Commission*, 237 F. 2d 741 (D.C. Cir. 1956). Petitioner for the first time asserts that this is the "controlling case in this area. . . ." (Pet. 14); however, petitioner's subsequent arguments (Pet. 17) relating to "primary judicial jurisdiction" are plainly at odds with the familiar principles laid down by the *City of Pittsburgh* decision and by this Court's decisions in the *McLean Trucking* and *Minneapolis Railroad* cases (fns. 6 and 7, p. 21 supra).

[4] The decisions of the Presiding Examiner and the Commission prove the exact contrary of petitioner's assertion that the Commission "utterly failed to consider the factual questions usually present in antitrust problems" (Pet. 20)

At the outset of the hearings, petitioner's sole objection to the merger was that California should not be dependent upon a single out-of-state supplier of natural gas (JA 5-7, 1187).

Astoundingly, petitioner asserts in this Court for the first time, and now that there are three companies serving California, that its "awareness . . . of the advantages of a *single service* [to its borders by its pipeline supplier] does not justify" extension of single service by that supplier "to other areas and territories which are foreign to its regular places of operation" (Pet. 13) (emphasis supplied). Petitioner, which has persistently urged that the standards of the antitrust laws were paramount and that California should be served with natural gas in a competitive setting the same as other businesses (JA 7), now states ". . . unrestricted building of pipelines to its borders . . . would serve neither private nor public interest" (Pet. 13).

The consequence of petitioner's contention that the Commission should have deferred its hearing and decision in its proceeding until determination of the antitrust case,[1] would be the crippling of Commission power under Section 7 of the Natural Gas Act, the "heart of the Act",[2] with respect to any proposal brought to the Commission—any proposed construction, extension, acquisition or operation of natural gas facilities—where any antitrust matter was involved relating to that proposal, or any antitrust action was pending.[3] Petitioner also seeks sanction for "sporadic" action which would interfere with Commission action under a statute which provides comprehensive and pervasive regulation with respect to those matters within its jurisdiction.[4]

The last paragraph of Section 7 of the Clayton Act provides that: "Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the . . . Federal Power Commission . . . under any statutory provision vesting such power in such Commission." To require postponement of Commission proceedings until a determination of a pending antitrust case would either delay or thwart the Commission in issuing certificates authorizing construction, acquisition or operation of

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[1] That objection, or question 1 stated in the petition (Pet. 2-3), is not subject to judicial review under Section 19(b) of the Natural Gas Act because of petitioner's failure to urge such objections in its application for rehearing. See also fn. 1, p. 12, supra.

[2] *Atlantic Refining Co.* v. *Public Service Commission of the State of New York*, 360 U. S. 378, 388.

[3] Section 20 of the Natural Gas Act, quoted only in part by petitioner (Pet. 15), provides solely that the Attorney General "in his discretion, may institute the necessary *criminal* proceedings" (emphasis supplied) after receipt of information from the Commission. Proceedings under Section 7 of the Clayton Act are civil. See also *Minneapolis & St. L. R. Co.* v. *United States*, 361 U.S. at 192. Moreover, there is considerable doubt that these provisions may be invoked where the matters involved come within the Commission's jurisdiction. *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426.

[4] See *United States* v. *Radio Corporation of America*, 358 U.S. 334, 348. Petitioner concedes that denial of the application by the Commission would "partially remedy the situation", though it complains this would not be "a complete or satisfactory remedy" (Pet. 19). Thus, if the Commission had rejected the applications, the antitrust laws may have been free to operate. However, delay of Commission proceedings awaiting resolution of the antitrust case would constitute "sporadic" interference since it would either thwart the Commission's statutory power or delay the effectuation of the public interest.

natural gas facilities. Congress has declared that in any event, the matter involved may violate such provision of the antitrust laws if, having taken the factor of competitive impact into consideration, it is otherwise required by the public convenience and necessity. A contrary view would nullify the meaning of this explicit exemption. See *Minneapolis & St. L. R. Co.* v. *United States*, 361 U.S. at 187-88; and *McLean Trucking Co.* v. *United States*, 321 U.S. at 79-80.

Quite apart from the explicit provisions of the exemptive paragraph of Section 7 of the Clayton Act, as in the *McLean* situation, the entire history of natural gas regulation "suggests . . . that the policies of the antitrust laws determine 'the public interest' " in natural gas regulation "only in a qualified way" 321 U.S. at 83. Congress made clear in connection with enactment of the Natural Gas Act and the 1942 amendment to Section 7 of the Natural Gas Act, that it was the Commission's duty to control the existence of and extent of competition.[1]

The Court of Appeals properly held that the Commission has "ample power to approve—or disapprove—the acquisition by one natural gas company of the assets of another such company"; that "the Commission must recognize the policies of the antitrust laws, but it must also recognize its own responsibilities under its own laws"; and that the Natural Gas Act and the antitrust laws must be viewed

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[1] It should also be noted that the provisions of Section 7 of the Natural Gas Act, as amended in 1942, were modeled after the provision of the Motor Carrier Act, which the Court construed in *McLean Trucking Co.* v. *United States*, 321 U. S. 67. See hearings before the House Committee on Interstate and Foreign Commerce, H.R. 5249, 77th Cong., 1st Sess., 5, 81-82 (1942); H.R. Rep. No. 1290, 77th Cong., 1st Sess. 2-3 (1941); S. Rep. No. 948, 77th Cong., 2d Sess. 1-2 (1942).

See also, e.g., H.R. Rep. No. 709, 75th Cong., 1st Sess., 1-2 (1937); Hearings before the House Comm. on Interstate and Foreign Commerce, H.R. 4008, 75th Cong., 1st Sess. 43-44, 81-83 (1937); House debates, 81 Cong. Rec. 6720-25 (1937).

While in a case involving the question of two pipelines or one to serve Detroit, the Court of Appeals said that there is nothing in the Natural Gas Act to suggest monopoly is better than competition (*Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 169 F.2d 881, 884 (D.C. Cir. 1948), cert. denied, 335 U.S. 854), there is nothing in the Act or the legislative history to suggest as an abstract principle that competition is better than monopoly.

as "complementary" or "supplementary"[1] (Pet. App. A, 9, 11).

Petitioner's efforts to seek review on the ground that the Commission should have deferred to the District Court,[2] really amount to an effort to seek review of the District Court's order of October 13, 1958 which deferred trial of the antitrust case until final determination of the Commission proceedings. And the Department of Justice did not seek review of that determination.

In hearing and deciding the case, the Commission carried out explicit Congressional directions contained in Sections 7(c) and 7(e) of the Natural Gas Act. Section 7(c) provides that when an application for a certificate is filed proposing construction, extension, acquisition or operation of natural gas facilities:

> "[T]he Commission shall set the matter for hearing . . . and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly. . . ."

Section 7(e) provides that a

> ". . . certificate shall be issued to any qualified applicant therefor . . . if it is found . . . that the proposed service, sale, operation, construction, extension, or acquisition . . . is or will be required by the present or future public convenience and necessity. . . ."

In this case, the Commission effectively carried out its duties.

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[1] Petitioner argues first (Pet. 15, heading "3") that the Commission did not "accommodate the *complementary* policies" underlying the Natural Gas Act and the antitrust laws; and a page later (Pet. 16) petitioner asserts that the "accommodation of two *competing* policies is at issue" (emphasis supplied).

[2] The Commission, in fact, in its letter of October 7, 1958 to the District Court, did defer to the District Court's judgment.

Conclusion

There are no reasons which support or justify the granting of the writ of certiorari sought by petitioner. The Court of Appeals properly affirmed the decision of the Commission. Accordingly, the petition should be denied.

Respectfully submitted,

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APPENDIX

Relevant Portions of Statutes and Rules Involved

Sections 7(c) and 7(e) of the Natural Gas Act of June 21, 1938, 52 Stat. 825, as amended 56 Stat. 83 (1942); 15 U.S.C. §§ 717f(c) and 717f(e).

"EXTENSION OF FACILITIES; ABANDONMENT OF SERVICE

* * * * *

"(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act [February 7, 1942], over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act [February 7, 1942]. Pending the determination of any such application, the continuance of such operation shall be lawful.

"In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

* * * * *

"(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require."

Sections 19(a) and 19(b) of the Natural Gas Act of June 21, 1938, 52 Stat. 831, as amended 62 Stat. 991, 992 (1948), 63 Stat. 107 (1949), 72 Stat. 947 (1958), 15 U.S.C. §§ 717r(a) and 717r(b).

"REHEARINGS; COURT REVIEW OF ORDERS

"(a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this Act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this Act.

"(b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition

praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in [section 1254 of Title 28].[1]

[1] As originally enacted (52 Stat. at 832), the bracketed phrase was as follows: "... in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347)."

Section 7 of the Clayton Act, October 15, 1914, c. 323, § 7, 38 Stat. 731, amended December 29, 1950, c. 1184, 64 Stat. 1125-1126, 15 U.S.C. § 18.

"SEC. 7. That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

* * * * *

"Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Civil Aeronautics Board, Federal Communications Commission, Federal Power Commission, Interstate Commerce Commission, the Securities and Exchange Commission in the exercise of its jurisdiction under section 10 of the Public Utility Holding Company Act of 1935, the United States Maritime Commission, or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Secretary, or Board."

Section 1.26(5)(d) of the Rules of Practice and Procedure of the Federal Power Commission (1958):

"(d) *Official notice of facts.* Official notice may be taken of such matters as might be judicially noticed by the courts of the United States or of any other matter of technical or scientific fact of established character peculiarly within the general knowledge of the Commission as an expert body; *Provided*, That any party shall, on timely request, be afforded an opportunity to show the contrary."

SUPREME COURT, U. S.
Office-Supreme Court, U.S.
FILED
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REPLY BRIEF OF PETITIONER

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 187

PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

vs.

FEDERAL POWER COMMISSION, EL PASO NATURAL GAS COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

Reply Brief of Petitioner to Briefs for the Federal Power Commission and the El Paso Natural Gas Company in Opposition

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Section 1.31(c) of the Rules of Practice and Procedure of the Federal Power Commission (1958):

> "(c) *Failure to except results in waiver.* Failure to file exceptions within the time allowed under this section shall constitute a waiver of all objections to the intermediate decision served. No matter not included in the exceptions filed as provided in this section may thereafter be objected to before the Commission upon brief or oral argument, or in an application for Commission rehearing; and any matter not included in such exceptions shall be deemed waived. Exceptions covering rulings admitting or excluding evidence not objected to at the time the rulings were made, will be unavailing."